

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA-17-0020

DENICE A. STOKKE

Plaintiff/Appellant,

vs.

AMERICAN COLLOID COMPANY, A Delaware Corporation; G.K.
CONSTRUCTION, INC., a Wyoming Corporation; and JOHN DOES I-III

Defendants/Appellees

OPENING BRIEF OF APPELLANT DENICE A. STOKKE

On Appeal from the
Montana Twenty Second Judicial District Court, Carbon County
Cause No. DV-15-68
The Honorable Blair Jones, District Court Judge

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1 **Statutes**

2 Mine Safety and Health Act (MSHA), 30 U.S.C. § 80131

3 **Other Authorities**

4 Restatement (Second) of Torts § 41428

1. Whether the legal duties imposed by the doctrines of “premises liability” and “owner-independent contractor liability” exist concurrently, or are mutually exclusive.

a. Whether the “inherently dangerous activity” rule applies.

c. Whether the American Colloid Company owed non-delegable duties of safety under the Mining Safety and Health Act.

Plaintiff Denice A. Stokke (“Ms. Stokke” or “Stokke”) brought this personal injury case against American Colloid Company (“ACC”) and G.K. Construction, Inc. (“GK”) in the Montana Twenty-Second District Court, Carbon County (the “District Court”). (Complaint, (Aug 7, 2015), Dkt.

1). GK Construction subsequently settled and is no longer a

1 party. (Mediator Report (March 8, 2017) Supreme Court Cause DA17-
2 0020).

3 ACC owns and operates a large bentonite mine. (ACC Summ. J.
4 Order, (Dec. 15, 2016), Dkt.72 at 1, attached as App. "1"). Ms. Stokke
5 worked for a company called 4N Trucking, Inc. ("4N Trucking"). (ACC
6 Summ. J. Order, Dkt.72 at 2, see App. "1"). ACC contracted with 4N
7 Trucking to provide services, including watering the mine's roads for dust
8 control. *Id.* Ms. Stokke alleges that she was injured while crossing boards
9 to access a water well on ACC's mine property. *Id.*

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11
12 Following a period of discovery, ACC made two motions for summary
13 judgment. In the first motion, it argued that it owed no *legal duty* to Ms.
14 Stokke, because she was employed by its subcontractor, i.e. 4N
15 Trucking. (ACC Mot. for Summ. J. and Br. in Support re Duty, Dkts. 53-
16 54). In its second motion, it argued that there was no *factual evidence* that
17 ACC breached its duty of care, if one existed. (ACC Mot. for Summ. J. and
18 Br. in Support re Liability, Dkts. 55-56).

19
20 The District Court granted ACC's first motion, holding *as a matter of*
21 *law* that ACC owed no duty to Ms. Stokke. (ACC Summ. J. Order, Dkt. 72
22 at 11-12, see App. "1"). The District Court decided that since ACC owed no
23 legal duty to Ms. Stokke, there was no need to progress to the factual
24

1 question of whether ACC breached such a duty. (ACC Summ. J. Order,
2 Dkt. 72 at 12, see App. "1"). The District Court dismissed Ms. Stokke's
3 claims against ACC. (ACC Summ. J. Order, Dkt.72 at 12, see App. "1").
4

5 STATEMENT OF FACTS

6 ACC owns a bentonite mine north of Lovell, Wyoming. (Complaint,
7 Dkt. 1, ¶¶ 9-10; ACC Answer to Complaint, Dkt. 6, ¶9). ACC contracted
8 with 4N Trucking for a variety of services, including road maintenance and
9 road watering to suppress dust. (Stokke Response to ACC Mot. Summ. J.,
10 Dkt. 62, Ex. "2" at 1, Contract attached as App. "2". Hereafter referred to
11 as "the Contract").
12

13 On the date of her injury, Ms. Stokke was working for 4N Trucking
14 operating a water tanker; she had been in this job for only about five
15 months. (Stokke Response to ACC Mot. Summ. J., Dkt. 62, Ex. 3, Stokke
16 Depo. 83:13-84:9 and 90:15-91:11). Ms. Stokke's job required her to water
17 roads located on ACC's mine. (Stokke Response to ACC Mot. Summ. J.,
18 Dkt. 62, Ex. "3", Stokke Depo. 84:16-25). She typically began at 2:30 a.m.
19 and continued until mid-afternoon. (Stokke Response to ACC Mot. Summ.
20 J., Dkt. 62, Ex. "3", Stokke Depo. 85:12-14). Her job also required her to fill
21 the water truck from a water well. (Stokke Response to ACC Mot. Summ.
22 J., Dkt. 62, Ex. "3", Stokke Depo. 88:5-7). This well was located on land
23
24

1 owned by ACC.¹ (Complaint, Dkt. 1, ¶16; AC Answer to Complaint, Dkt. 6,
2 ¶ 9).

3 A ditch ran around the well. (ACC Br. in Support of Mot. for Summ. J.
4 re Duty, Dkt. 54, Ex. "A" Newlin Depo. 102:18-25). Access to the well was
5 provided by a "bridge" consisting of three 2" x 4" pieces of lumber, 1-2 feet
6 above the ground. (Stokke Response to ACC Mot. Summ. J., Dkt. 62, Ex.
7 "8", Newlin depo 22:8-16). The 2 x 4s were not affixed to one another.
8 (ACC Br. in Support of Mot. for Summ. J. re Liability, Dkt. 54, Ex. "B"
9 Newlin Depo. 130:14-19). While Ms. Stokke crossed the "bridge", one or
10 more of the 2 x 4s twisted, causing her to twist and bounce off the bridge.
11 (ACC Br. in Support of Mot. for Summ. J. re Liability, Dkt. 56, Ex. "B",
12 Deposition, Denice Stokke 109:10-16). Ms. Stokke alleges she suffered
13 serious injury from the fall. (Complaint, Dkt. 1, ¶ 19-22).

14 Ms. Stokke supplied the District Court with the expert report of Jack
15 Spadaro, a mine safety expert. (Stokke Response to ACC Mot. Summ. J.,
16 Dkt. 62, Ex. "5"). After reviewing discovery materials, Mr. Spadaro offered
17 the following three conclusions concerning ACC's safety practices. These
18 were quoted in Ms. Stokke's Response to ACC Mot. Summ. J. Brief.
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23 ¹ The owner of the *water rights* themselves is Lee Carr, who has a right to sell water from
24 the well, granted by the State of Montana. (Stokke Response to ACC Mot. Summ. J.,
Dkt. 62, Exhibit 9, Deposition of Lee Carr, 2:7-15).

1. American Colloid Company and GK Construction Inc. created and/or maintained an unsafe entrance to the water well location where Denice Stokke was required to replenish water supplies for water trucks used to maintain haul roads on American Colloid Company's Yellowtail Mine. **American Colloid and GK Construction Inc. constructed and/or maintained and allowed to remain in place an unstable platform that could not be crossed safely to service the water trucks at the well site. These unsafe conditions put Denice Stokke at risk of serious injury on September 24, 2012 and were a direct cause of her severe injuries.**
2. American Colloid Company and GK Construction Inc. did not provide safe access to the well site as required by MSHA mandatory safety regulations. American Colloid Company and GK Construction Inc. deliberately violated four (4) mandatory mine safety regulations by requiring Denice Stokke to cross an unstable bridge in an area that did not have adequate illumination. American Colloid and GK Construction also did not perform adequate safety examinations of the work areas and required employees to work alone in an unsafe area. These conditions led directly to the injury of Denice Stokke on September 24, 2012.
3. American Colloid Company and GK Construction Inc. did not meet industry standards of care to protect contractor employees from hazardous conditions while working on mine property. American Colloid and GK Construction showed a flagrant disregard for the safety of Denice Stokke and other employees by failing to ensure safe access to the work area, thereby putting **all** workers at risk of serious injury in the vicinity of the water well. This disregard for safety led directly to the injury of Denice Stokke.

(Stokke Response to ACC Mot. Summ. J., Dkt. 62, Ex. "5" at 14 Spadaro Report at 3-4)(emphasis added). The District Court did not address the veracity of these opinions because it determined that ACC owed no legal

1 duty to Ms. Stokke. It held, “because the Court concludes that [ACC]
2 does not owe Stokke a legal duty of care, the Court need not address
3 [ACC’s] separate summary judgment motion with respect to *evidence* of
4 liability under a premises liability theory. (ACC Summ. J. Order, Dkt.72 at
5 12, see App. “1”).

7 STATEMENT OF THE STANDARD OF REVIEW

8
9 The standard of review for a district court’s grant of summary
10 judgment is as follows:

11 We review a grant of summary judgment *de novo*, assessing the
12 same standard under Rule 56, M.R.Civ.P., as the district court. The
13 district court must decide, while viewing the offered proof in the light
14 most favorable to the non-moving party, whether there exists any
genuine issue of material fact. If none exists, the district court must
then decide whether to grant the motion as a matter of law.

15 *Montana Mt. Products v. Curl*, 2005-1 Trade Cases P 74, 768, 327 Mont. 7,
16 ¶ 8, 112 P.3d 979, 980 (2005)(internal citations omitted).

18 SUMMARY OF THE ARGUMENT

19 The District Court erred in several respects. First and foremost, it
20 treated the duties imposed by the doctrines of “premises liability” and
21 “owner-independent contractor liability” as if they are mutually
22 exclusive. The first doctrine requires that a landowner “use ordinary care in
23 maintaining the premises in a reasonably safe condition and to warn of any
24

1 hidden or lurking dangers.” *Richardson v. Corvallis School Dist. No. 1*, 286
2 Mont. 309, 321, 950 P.2d 748, 755 (1997). The second doctrine holds that
3 although a general contractor or owner generally does not owe a duty to
4 prevent injuries to subcontractors’ employees on construction projects,
5 such a duty may exist where: 1) there is a nondelegable duty based on
6 contract, 2) an activity is inherently or intrinsically dangerous, or 3) the
7 owner or general contractor negligently exercises control retained over the
8 subcontractor’s work. *Cunnington v. Gaub*, 2007 MT 12 ¶ 13, 335 Mont.
9 296, 153 P.3d 1 (2007). The District Court erred in holding that because
10 Ms. Stokke was the employee of a subcontractor, the premises liability
11 doctrine did not apply at all to establish ACC’s duties. It refused to
12 consider whether the facts supported a potential premises liability
13 claim. The District Court also erred in determining that none of the three
14 aforementioned exceptions applies under the facts of this case. It thus held
15 that American Colloid Company owed no duty of care to Ms. Stokke, and
16 dismissed all of her claims.
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20 The summary judgment order should be reversed, and this case
21 remanded for further proceedings on the merits.
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ARGUMENT

I. THE DISTRICT COURT ERRED BY HOLDING THAT THE LEGAL DUTIES IMPOSED BY THE DOCTRINES OF “PREMISES LIABILITY” AND “OWNER-INDEPENDENT CONTRACTOR LIABILITY” ARE MUTUALLY EXCLUSIVE; THE TWO DOCTRINES CAN IMPOSE CONCURRENT DUTIES.

The District Court’s summary judgment order rests on a flawed foundation. It treats the theories of premises liability and owner-independent contractor liability as mutually exclusive--in effect ruling that the presence of an owner/general contractor-independent contractor business relationship eliminates the duties a landowner would otherwise owe under premises liability law. The District Court characterized its decision-making process thus: “The arguments presented require the Court first to determine whether to apply the rule of *premises liability* or the rule of *owner-independent contractor liability* to this case.” (ACC Summ. J. Order, Dkt.72 at 4, see App. “1”)(emphasis added). Because an owner-independent contractor relationship existed between ACC and Ms. Stokke’s employer (4N Trucking) the court decided that, “the general rule of owner-independent contractor liability . . . constitute[s] the applicable standard to apply to this case” and “reject[ed] Stokke’s argument that this is a premises liability case.” (ACC Summ. J. Order, Dkt.72 at 5, see App. “1”). **As we will explain, the two theories of liability exist concurrently, not**

1 **disjunctively. Otherwise, a business owner or general contractor who**
2 **also happens to be the owner or possessor of the underlying land**
3 **would be exculpated from any duty to maintain its premises in a**
4 **reasonably safe condition.**
5

6 “At the most basic level, we all share the common law duty to
7 exercise the level of care that a reasonable and prudent person would
8 under the same circumstances.” *Fisher v. Swift Transportation Co.*, 2008
9 MT 105, ¶ 16, 342 Mont. 335, 339, 181 P.3d 601, 606. Possessors of
10 premises thus owe duties to persons foreseeably on the premises,
11 specifically to maintain the premises in a reasonably safe condition and to
12 warn of any hidden dangers. *Richardson v. Corvallis Public School*
13 *District*, 286 Mont. 309, 321, 950 P.2d 748, 755 (1997).
14

15 At the outset, we note that ACC occupies two capacities: 1) that of a
16 business owner that retained a subcontractor (Ms. Stokke’s employer) to
17 provide road maintenance services, and 2) a landowner that owns the real
18 property where Ms. Stokke was injured. By ACC’s argument, it would only
19 have a duty of safety if it affirmatively assumed such a duty in its contract
20 with the subcontractor. It could, without fear of liability, require 4N
21 Trucking’s employees to face a gauntlet of dangers on the premises that
22 would otherwise give rise to liability. Such a rule would be entirely
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24

1 inconsistent with the protective purposes evident in premises liability law.

2 As this Court stated in *Richardson v. Corvallis Pub. Sch. Dist. No. 1*,
3 *supra.*:

4 [T]he interests of both the possessors of premises and those
5 persons foreseeably on the premises are better served by our
6 adoption of the following standard of care:

7 The possessor of the premises has a duty to use ordinary
8 care in maintaining the premises in a reasonably safe
9 condition and to warn of any hidden or lurking dangers.
10 What constitutes a reasonably safe premises is generally
11 considered to be a question of fact. Whether a premises
12 is reasonably safe depends to a large extent on what use
13 the property is put to, its setting, location and other
14 physical characteristics; the type of person who would
15 foreseeably visit, use or occupy the premises; and the
16 specific type of hazard or unsafe condition alleged.”

17 *Richardson*, 286 Mont. 309, 321, 950 P.2d 748, 755 (1997). This Court’s
18 language plainly holds that the rules governing premises liability have a
19 protective purpose for those foreseeably invited upon land, and in light of
20 the use to which the property is put. Here, this test would allow a jury to
21 consider all of the factors associated with Ms. Stokke’s presence on the
22 land, and to make a decision about whether ACC exercised reasonable
23 care under the circumstances. Unfortunately, the District Court erroneously
24 concluded that premises liability law does not apply because it is trumped
by the owner/general contractor-independent contractor relationship

1 between ACC and 4N Trucking. This Court has the opportunity to now
2 clarify the interrelationship between these two doctrines of liability.

3 Specifically, this case provides the opportunity to affirm that these doctrines
4 exist concurrently, not disjunctively.
5

6 As the Court considers these issues, it is also important to be mindful
7 of the policies underlying the owner-independent contractor doctrine. It
8 was established around *construction projects* because of the unique
9 circumstances that exist in such projects. The project's condition and
10 dangers are typically dynamic and constantly changing. An owner or
11 general contractor may not always be in control. By contrast, if a worker
12 happens to be on a site where there is no construction occurring, the
13 landowner or possessor is in a superior position to keep the premises
14 maintained and to know of hazards. Further, the doctrine reflects the
15 unique roles regarding safety that typically exist on a construction project.
16
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18 This Court has been careful in recent years to limit the application of
19 the doctrine to construction cases. This Court stated as much when it
20 decided *Steichen v. Talcott Properties, LLC*. 2013 MT 2, ¶ 13, 368 Mont.
21 169, 173, 292 P.3d 458, 461. There, this Court held that it was error to
22 apply "construction industry standards", i.e. the owner-independent
23 contractor doctrine, in a case in which an independent contractor's
24

1 employee was injured, but not on a construction site. This Court held that
2 ordinary premises liability rules should apply:

3 The District Court correctly determined that Talcott had a duty
4 to Steichen to use ordinary care in maintaining the building in a
5 reasonably safe condition, as explained in *Richardson*. The
6 District Court erred, however, in applying the construction
7 industry liability standards to this case, and in determining that
8 Talcott owed no duty to Steichen because Steichen was an
9 independent contractor. **This is not a construction site case
10 and there was no reason to make any duty decision based
11 upon Steichen's status as an independent contractor with
12 Bresnan.** Independent contractor status is relevant in
13 construction industry cases, but not in ordinary premises liability
14 cases.

15 *Steichen*, 2013 MT 2 ¶ 13 (emphasis added).

16 Although Ms. Stokke was not injured on a construction site, the
17 District Court here ruled that the owner-independent contractor rule applied
18 exclusively, and thus that premises liability rule did not apply. (ACC Summ.
19 J. Order, Dkt.72 at 7, 12, see App. “1”). In determining which rule to apply,
20 the Court relied heavily on the following passage from *Steichen*,

21 In construction projects there are often layers of involvement
22 with the project owner, the general contractor, subcontractors,
23 independent contractors and employees of each of them. One
24 of the rules of law that is applied to construction projects is that
25 a prime or general contractor is not liable for injuries to
26 employees of an independent contractor...”

27 *Steichen*, 2013 MT 2, ¶ 17. This passage actually reinforces the notion
28 that construction cases present a unique breed of cases.

1 The District Court in the present case reasoned that Stokke's claim
2 was "plainly distinguishable from *Steichen*." (ACC Summ. J. Order, Dkt.72
3 at 6, see App. "1"). The Court held that the existence of the Contract
4 establishing 4N Trucking as an independent contractor, in combination with
5 the fact that Stokke was injured while working for 4N Trucking in
6 furtherance of that contract, precluded the Court from analyzing Stokke's
7 claim under the premises liability rule. *Id.* at 5. The Court mentioned the
8 fact that ACC had agreements with other independent contractors. *Id.* at 7.
9 The District Court relied on three Montana cases and one Michigan case to
10 support its holding that the premises liability standard should not apply. *Id.*
11 at 4-7 (citing *Beckman v. Butte-Silver Bow County*, 2000 MT 112, 299
12 Mont. 389, 1 P.3d 348, *Fabich v. PPL Montana*, 2007 MT 258, 339 Mont.
13 289, 170 P.3d 943, *Cunnington v. Gaub*, 2007 MT 12, 335 Mont. 296, 153
14 P.3d 1, and *Banaszak v. Northwest Airlines, Inc.*, 776 N.W.2d 910 (Mich.
15 2010)). In so doing, the District Court turned this Court's precedent on its
16 head.
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20 The District Court cited to no authority for its decision to apply one
21 standard and to disregard the other. Neither *Fabich* nor *Cunnington*, nor
22 *Beckman* hold that a landowner or general contractor on a construction site
23 cannot be liable under both theories of liability. Nothing in the controlling
24

1 cases explicitly states that the relevant standards of liability are mutually
2 exclusive. Furthermore, all the cases relied on by the District Court are
3 construction cases, while the present case is not.

4 This Court's language in *Steichen* suggests that the proper result
5 here would have been the opposite of the District Court's opinion.

6 "Independent contractor status is relevant in construction industry cases,
7 but not in ordinary premises liability cases." *Steichen*, 2013 MT 2, ¶ 13. The
8 present case is not a construction industry case. The complex "layers of
9 involvement" that give rise to the owner-independent contractor liability
10 doctrine do not exist here. This is, first and foremost, a premises liability
11 case. ACC invited business entities and their employees onto its land to
12 perform services; it has a duty to ensure that the premises are reasonably
13 safe. Modern law emphasizes that, despite the status of the individual on
14 the property, ". . . distinctions have been abandoned in favor of an
15 emphasis upon the exercise of ordinary care by the landowner". *Steichen*,
16 2013 MT 2, ¶ 15 (citing *Richardson* at 286 Mont. 309, 317, 950 P.2d at
17 753). Just as this Court reversed the district court in *Steichen*, it should do
18 so here.

19 By holding that only one path to liability exists, i.e. the owner-
20 independent contractor standard, the District Court would allow landowners
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1 to entirely skirt their duties to a class of people on their land. Under the
2 District Court's reasoning, so long as an owner-independent contractor
3 relationship exists, the employees of a subcontractor would rarely have
4 recourse against landowners who contracted with their employers. In
5 contrast, a non-employee could be invited to walk across the same area
6 and be hurt in the exact same fashion as Ms. Stokke, and would have a
7 claim against ACC.
8

9 *Richardson* eliminated the status distinctions of invitee, licensee, and
10 trespasser "in favor of emphasis upon the exercise of ordinary care by the
11 owner." *Steichen*, 2013 MT 2, ¶ 15. Here, this Court's prior case law, and
12 public policy, mandate that the premises liability obligations remain intact
13 notwithstanding the existence of an owner-independent contractor
14 relationship. The duty to use ordinary care to maintain a premises in a
15 reasonably safe condition should apply to any invitee injured by a condition
16 found on the land, regardless of their status as employee of an
17 independent contractor.
18
19

20 The present case is also distinguishable from the cases discussed by
21 the District Court because in all these instances the plaintiffs were injured
22 by an act directly related to construction or similar activities, and not by a
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24

1 condition associated with the land itself.² In the present case, Stokke did
2 not suffer injuries from a trenching cave-in, faulty scaffolding, or slippery grit
3 underfoot in a scrubber vessel. Stokke's case is more similar to the facts in
4 *Steichen*, than any construction liability case. The District Court erred in
5 ruling that ACC owed no duties under premises liability law.
6

7 **II. EVEN IF AMERICAN COLLOID COMPANY'S DUTIES ONLY AROSE**
8 **UNDER THE DOCTRINE OF "OWNER-INDEPENDENT CONTRACTOR**
9 **LIABILITY", THE DISTRICT COURT ERRED IN ITS CONCLUSION THAT**
10 **AMERICAN COLLOID COMPANY OWED NO SAFETY-RELATED DUTY TO**
11 **MS. STOKKE.**

12 The District Court relied on what it labelled the "owner-independent
13 contractor rule" to dismiss Ms. Stokke's claims on summary judgment. This
14 was the court's nomenclature to describe the general rule that "absent
15 some form of control over the subcontractor's method of operation, the
16 general contractor and owner of a construction project are not liable for
17 injuries to the subcontractor's employees." *Cunnington*, 2007 MT 12, ¶ 13,
18 (citing *Shannon v. Wright*, 181 Mont. 269, 275, 593 P.2d 438, 441 (1979)).
19

20 ² In *Beckman v. Butte-Silver Bow County*, 2000 MT 112, 299 Mont. 389, 1 P.3d 348, an
21 employee of an independent contractor suffered injuries and sued Butte-Silver Bow
22 County after a trench collapsed on him. *Beckman*, 2000 MT 112, ¶ 5. The plaintiff was
23 actively involved in a construction project, namely, extending underground waterlines.
24 *Id.* at ¶ 7. In *Fabich v. PPL Montana*, 2007 MT 258, 339 Mont. 289, 170 P.3d 943, the
plaintiff slipped and fell off scaffolding while relining a scrubber vessel with steel plates.
Fabich, 2007 MT 258, ¶ 7. In *Cunnington v. Gaub*, 2007 MT 12, 335 Mont. 296, 153
P.3d 1, the plaintiff suffered injuries after falling from make-shift scaffolding consisting of
a ladder, sawhorses, and planks, while siding a house. *Cunnington*, 2007 MT 12, ¶¶ 7-
8.

1 The Court has recognized three exceptions to this rule, “(1) where there is
2 a nondelegable duty based on a contract; (2) where the activity is
3 inherently or intrinsically dangerous; and (3) where the general contractor
4 negligently exercises control reserved over a subcontractor's work.” *Id.*
5 (internal quotations and citations omitted). For the reasons explained
6 earlier, Ms. Stokke maintains that the District Court erred by using this rule
7 to frame the issues. However, even if the law imposed this rule as the sole
8 path to recovery for Ms. Stokke, the facts support that the exceptions apply.
9

10
11 A. Mining is an inherently dangerous activity and
12 therefore subject to that exception of the owner-
13 independent contractor liability doctrine.

14 The District Court held that the “inherently dangerous activity”
15 exception did not apply. In doing so, the Court focused on the particular
16 activity in which Ms. Stokke was engaged at the time of her injury rather
17 than ACC’s operation as a whole, i.e. filling a water tanker truck. It
18 concluded that there was no evidence that Ms. Stokke’s injury “arose ‘from
19 risks caused by or engaging in’ mining.” (ACC Summ. J. Order, Dkt.72 at
20 11, see App. “1”). It focused excessively on the particular activity in which
21 Ms. Stokke was engaged at the moment of her injury, rather than applying
22 a broader view and asking whether the activity in which *ACC was engaged*
23 constituted an inherently dangerous activity. ACC successfully deflected
24

1 the District Court's attention from what was actually taking place, which
2 was *bentonite mining*. It is that activity which mandates that ACC remain in
3 control of activities at the mine.

4 The general principles concerning inherently dangerous activities are
5 set out in *Beckman v. Butte-Silver Bow County*, 2000 MT 112, 299 Mont.
6 389, 1P.3d 348 and *Fabich v. PPL Montana, LLC*, 2007 MT 258, 339 Mont.
7 289, 170 P.3d 943. However the Court's recent decision in *Paull v. Park*
8 *County, Montana*, 2009 MT 321, 352 Mont. 465, 218 P.3d 1198, is more
9 directly on point. There, a prisoner was injured in a motor vehicle
10 accident while being transported by a private company from Florida to
11 Montana. Similar to the District Court here, the district court in that case held
12 that 'driving' was not inherently dangerous, and thus no liability existed with
13 respect to the defendant county. The Montana Supreme Court rejected
14 this holding of the district court, finding that *prisoner transportation is an*
15 *inherently dangerous activity* as a matter of law. *Paull*, 2009 MT 321, ¶ 29.
16 Importantly, it found that a duty existed even though "the injury to the
17 plaintiff did not occur as a result of the typical unreasonable or unique risks
18 inherent in prisoner transport." *Id.* It was enough that the risk, driver
19 misconduct, "was an inherent danger in the transportation of prisoners,
20 which is inherently dangerous work, and that it is a part of the peculiar risk
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1 of harm which arose from engaging in that activity.” *Id.* at ¶ 30. “Thus, the
2 tortious conduct . . . falls within an exception to the rule that a contractor
3 may not be held liable for the torts of an independent subcontractor. . . .
4 [and], the County may therefore be subject to vicarious liability for the acts
5 or omissions of its contractor, AEI.” *Id.*

7 Here, as there, the broader activity (mining) is one which is
8 inherently dangerous. The Federal District Court for the District of
9 Montana has held:

10 Like the *Paull* and *Beckman* Court, this Court holds that mining
11 is an activity that has significant safety risks that involve
12 more than just the inhalation of airborne contaminants.
13 Moreover, in interpreting *Beckman*, the Montana Supreme
14 Court, in *Chambers v. City of Helena*, 2002 MT 142, 310 Mont.
15 241, 49 P.3d 587, 591 (Mont. 2002) (overruled on other grounds),
16 held “that the determination of inherent danger should not rest
17 only on the difficulty of the safety measures, but also on the
18 nature of the activity itself.”

19 *Cobos v. Stillwater Min. Co.*, CV 11-18-BLG-RFC, 2012 WL 6018147, at *6
20 (D. Mont. Dec. 3, 2012).

21 This conclusion is buttressed by the fact that Congress has noted that
22 mining is an inherently dangerous industry. 30 U.S.C. § 801 (1983); see
23 also *McColgan v. United Mine Workers of America*, 124 Ill. App. 3d 825, 464
24 N.E.2d 1166, 1169, 80 Ill. Dec. 183 (Ill., 1984), and *Cobos v. Stillwater*
Min. Co., CV 11-18-BLG-RFC, 2012 WL 6018147 (D. Mont. 2012). Just

1 as in *Paull* and *Cobos*, the Court here should look at the broader activity in
2 which the owner or general contractor was engaged, rather than the
3 discrete task the employee was performing at the time of injury. The
4 *Cobos* court explained the distinction well:

5
6 Defendant asks this Court to narrowly focus its analysis on the
7 inhalation of airborne contaminants and conclude that such
8 activity is not necessarily inherently dangerous and only
9 requires standard safety precautions. The same type of narrow
10 view was rejected by the Montana Supreme Court in *Paull v.*
11 *Park County*, 218 P.3d 1198 (Mont.2009). *Paull* involved
12 Defendant Park County contracting with a private prisoner
13 transportation service to transport a prisoner to Montana. In
14 rejecting Park County's argument that driving was not an
15 inherently dangerous activity, the *Paull* Court looked at broader
16 aspects of the inherently dangerous activity rather the specific
17 allegation that allegedly caused the plaintiff's injury. In so doing,
18 the *Paull* Court concluded the transportation of prisoners, as a
19 whole, was an inherently dangerous activity.

20
21 *Cobos v. Stillwater Min. Co.*, CV 11-18-BLG-RFC, 2012 WL 6018147, at *6
22 (D. Mont. 2012).

23
24 In the present case, the District Court parsed the activity in far too
thin a fashion. The question is not whether operating a water tanker and
filling it from a well is inherently dangerous, but whether the mining
enterprise was an inherently dangerous activity requiring the mine operator
to maintain control and safety practices in connection with the mine
operation. The District Court focused too narrowly. It stated, "There is no
evidence to support the notion that the water hauling and dispersal she was

1 engaged in are inherently dangerous.” (ACC Summ. J. Order, Dkt.72 at 10,
2 see App. “1”). Its analysis improperly shifts the focus off of the mining
3 environment, which imposes specific safety obligations on the mine
4 operator, and onto the discrete task the employee was performing at the
5 time of her injury.
6

7 Clearly, under *Paull* and *Cobos*, the proper focus is on the activity in
8 which the mine operator was engaged and whether it was inherently
9 dangerous. Once it is deemed so, the operator has a nondelegable duty to
10 the subcontractor’s employee. *Cobos*, 2012 WL 6018147 at *6. It is not
11 as though this creates strict liability for the owner. Once a duty exists, a
12 plaintiff must still establish all of the typical elements of negligence. *Id.* The
13 District Court erred in determining that the inherently dangerous activity
14 exception does not apply.
15

16
17 B. American Colloid Company retained control over part of its
18 independent contractor’s work and thus had a duty to avoid
19 the negligent exercise of that control.

20 Owners are also liable to employees of independent contractors if
21 the owner negligently exercises reserved control over the subcontractor’s
22 work. *Beckman*, 2000 MT 112, ¶ 12. In *Beckman*, the Montana Supreme
23 Court considered this exception, and looked to several facts to see if the
24 exception applied. Specifically, the permits and other water extension

1 documents for the trenching project provided that Butte-Silver Bow County
2 “may provide supervision” on the project, that the County would provide a
3 qualified construction inspector for “monitoring” the work, and stated that
4 the “methods of construction” shall conform to the requirements of the
5 County. *Beckman*, 2000 MT 112, ¶ 38. Further, the Court considered the
6 fact that County employees were present at the job site. *Id.* In light of all of
7 these facts, the Court concluded a genuine issue of material fact existed as
8 to whether or not the County reserved control and thus exposed itself to
9 liability. *Id.* at ¶ 40.

11
12 The Court reached a similar conclusion in *Cunnington*, *supra* despite
13 the fact that “the Contract [was] silent as to who was responsible for safety
14 on the project.” *Cunnington*, 2007 MT 12, ¶ 6. This Court’s reasoning, and
15 the rule that emerged from the case, define ACC’s obligations in the
16 present case. Like earlier cases, this Court quoted the Restatement
17 (Second) of Torts § 414 for guidance. *Id.* at ¶ 21. The Restatement rule is
18 as follows:
19

20 One who entrusts work to an independent contractor, but who retains
21 the control of any part of the work, is subject to liability for physical
22 harm to others for whose safety the employer owes a duty to exercise
23 reasonable care, which is caused by [the employer's] failure to
24 exercise [its] control with reasonable care.

1 (Restatement (Second) of Torts § 414)(emphasis added). The critical
2 language here is the phrase, “any part of the work”. It is not necessary that
3 the general contractor or employer retain control over every aspect of
4 safety. Retaining control over “any part of the work” is sufficient to give rise
5 to a duty of reasonable care to subcontractor employees.
6

7 Stokke explained in her brief below that genuine issues of material
8 fact existed as to whether ACC acted negligently. (Stokke Response to
9 ACC Mot. Summ. J. Mot., Dkt. 62 at 10). She attached the subject contract
10 to her brief as Ex. “2” (Stokke Response to ACC Mot. Summ. J. Mot., Dkt.
11 62, Ex. “2”, see App. “2”). The Contract empowered ACC to establish
12 safety standards with which 4N Trucking was required to comply:
13

14 . . . 4N shall observe all of the rules and regulations **required**
15 **by ACC** at the plant or mining sites and shall use due care and
16 diligence to protect the product and to prevent any damage to
the property of ACC.

17 (Contract at 5, see App. “2”)(emphasis added). The Contract empowered
18 ACC to terminate the contract “if 4N fails to abide by and comply with any
19 safety laws, rules and regulations”. *Id.* ACC also reserved the right to
20 “inspect any or all equipment described herein to ensure its compliance
21 with state and federal regulations.” *Id.* ACC reserved the power to impose
22 rules and regulations on 4N, to inspect 4N’s equipment, and to terminate
23 4N if it failed to satisfy ACC. In addition, ACC personnel operated close to
24

1 the well site and were regularly in the area. (Stokke Response to ACC Mot.
2 Summ. J., Dkt. 62, Ex “9” Lee Carr Depo. excerpts 34:6-24, 36:15-38:20,
3 39:19-41:25; Ex. “10” Depo Exs. “30”, “31”; Ex. 13, Charlie Marchant Depo.
4 excerpts 5:21-6:6, 9:18-24, 10:15-25, 13:12-19:11, 34:1-38:9; Ex. 14 Depo
5 Exs. “26”, “34”, “47”). ACC also invited 4N to use its well. (Stokke
6 Response to ACC Mot. Summ. J., Dkt. 62., Ex “8” Kim Newlin Depo. 98:4-
7 6). Taken together, these facts are adequate to establish that ACC owed a
8 duty, or at a minimum to establish a genuine issue of material fact
9 concerning that question.
10

11 Although Stokke supplied the District Court with the aforementioned
12 deposition sections, and the opinions of her mining safety expert Jack
13 Spadaro, the District Court erroneously concluded as a matter of law that
14 no duty existed. The District Court cited to *Fabich* and the contract
15 language. (ACC Summ. J. Order, Dkt. 72 at 7). It concluded, “Nothing in
16 the written contract between [ACC] and 4N Trucking indicates that [ACC]
17 retained any supervision or control over 4N Trucking’s work or the well-site
18 at issue.” (ACC Summ. J. Order, Dkt. 72 at 8, see App. “1”). However, the
19 Contract language in this case is significantly different from that in *Fabich*.
20 The language cited by the Court in *Fabich* did not authorize the owner to
21 establish rules and regulations and mandate that the subcontractor follow
22
23
24

1 them. See *Fabich* 2007 MT 258, ¶29. In contrast, the ACC - 4N Trucking
2 Contract did reserve that right to the owner, and imposed the related
3 mandate on the subcontractor. (Contract at ACC-5, see App. "2"). The
4 District Court erred in its interpretation of the Contract language and thus
5 improperly concluded it did not give rise to any duties.
6

7 C. As a mine operator, American Colloid Company also has
8 non-delegable duties of safety under the Mining Safety and
9 Health Act. The District Court erred by refusing to find such
10 a duty.

11 In her underlying brief, Ms. Stokke also cited the case of *Gibby v.*
12 *Noranda Minerals Corp.*, 273 Mont. 420, 905 P.2d 126 (1995) for the
13 proposition that violations of federal regulations intended to protect workers
14 can be negligence. (Stokke Response to ACC Mot. Summ. J., Dkt. 62, at
15 15). She supplied and cited mining safety expert Spadaro's report to
16 establish that ACC had in fact violated federal mining regulations and
17 standards. (Stokke Response to ACC Mot. Summ. J., Dkt. 62 at 16). The
18 District Court's Order ignored the *Gibby* case, failing to address it at all. As
19 we will explain, it erred by disregarding the rule that safety regulations can
20 also impose non-delegable duties on mine owners like ACC.
21

22 One of the issues this Court decided in *Gibby* was whether the district
23 court properly "instruct[ed] the jury that [the mine owner] had a
24

1 nondelegable duty to follow safety standards promulgated under the
2 authority of the Mine Safety and Health Act (MSHA), 30 U.S.C. § 801, and
3 that violation of the standard was evidence of negligence.” *Gibby*, 273
4 Mont. 420, 428-429. As here, the case arose out of injuries to a
5 subcontractor’s employee. *Id.* at 423. The district court in *Gibby* had
6 instructed the jury as follows:
7

8 The purpose of the Federal Mining Safety and Health Act
9 (“MSHA”) is the protection of life, the promotion of health and
10 safety, and the prevention of accidents. Under MSHA, Noranda
11 had the nondelegable duty to:

- 12 (1) correct hazardous conditions at the mine (section 57.3200);
- 13 (2) provide experienced persons to examine ground conditions,
14 haulage ways, travel ways, and surface areas both prior to
15 commencement of work and periodically during
16 performance of work in the mine (section 57.3401);
- 17 (3) inspect equipment and correct defects in the equipment,
18 machinery, and tools that affect safety to prevent the
19 creation of hazards to persons working in the mine (section
20 57.141000);
- 21 (4) prohibit use of machinery, equipment, and tools beyond the
22 design capacity intended by the manufacturer, where such
23 use may create a hazard to persons (section 57.14205);
- 24 (5) provide a competent person designated to examine each
25 working place at least once each shift for conditions which
26 may adversely affect safety or health and initiate appropriate
27 action to correct such conditions (section 57.18002); and
- 28 (6) initiate appropriate action to correct such conditions (section
29 57.18002).

1 *Gibby*, 273 Mont. 420, 429, 905 P.2d 126, 131. The Court held that the
2 subject jury instruction “sets forth the nondelegable duties any ‘operator’ of
3 a mining operation has under [MSHA].” *Id.* It went further to approve
4 another instruction, which stated, “Failure to discharge nondelegable duties
5 imposed by MSHA is evidence of negligence in Montana.” *Id.* (emphasis
6 added).
7

8
9 There are good reasons for the *Gibby* rule. A contrary result would
10 allow mine operators to avoid liability for their failure to comply with the
11 MSHA. All they would have to do is delegate without reservation their
12 safety duties. To allow this would be bad public policy, and contrary to the
13 holding of *Gibby*. Here, expert Spadaro evaluated the facts and opined
14 that ACC violated numerous mandatory MSHA safety regulations in
15 connection with the injury to Ms. Stokke.
16

17 Mr. Spadaro concluded that Defendant American Colloid, as an
18 operator of the mine was responsible under the MSHA regulations:
19

20 The Mine Safety and Health Administration holds mine
21 owners and operators responsible for the safety of
22 independent contractor employees on mine property.
23 American Colloid Company and GK Construction Inc. were
24 responsible for ensuring the safety of Denice Stokke and
any others who entered the American Colloid Company
property. They failed in their duty to do so. The MSHA
Program Policy states:

1 "MSHA's enforcement policy regarding independent
2 contractors does not change production operators' basic
3 compliance responsibilities. Production-operators are subject
4 to all provisions of the Act, and to all standards and
5 regulations applicable to their mining operations. This overall
6 compliance responsibility includes assuring compliance by
7 independent contractors with the Act and with applicable
8 standards and regulations. As a result, both independent
9 contractors and production operators are responsible for
10 compliance with all applicable provisions of the Act, standards
11 and regulations.

12 This "overlapping" compliance responsibility means that there
13 may be circumstances in which it is appropriate to issue
14 citations or orders to both the independent contractor and to
15 the production-operator for a violation. Enforcement action
16 against a production-operator for a violation(s) involving an
17 independent contractor is normally appropriate in any of the
18 following situations: (1) when the production-operator has
19 contributed by either an act or by an omission to the
20 occurrence of a violation in the course of an independent
21 contractor's work; (2) when the production-operator has
22 contributed by either an act or omission to the continued
23 existence of a violation committed by an independent
24 contractor; (3) when the production-operator's miners are
exposed to the hazard; or (4) when the production-operator
has control over the condition that needs abatement. In
addition, the production-operator may be required to assure
continued compliance with standards and regulations
applicable to an independent contractor at the mine."

(MSHA Program Policy Manual Part 45, February 2003)

(Stokke Response to ACC Mot. Summ. J., Dkt. 62, Ex. "5" Spadaro
Report at 4-5).

The District Court erred by failing to recognize that under *Gibby*, a
non-delegable duty requiring ACC to comply with the MSHA existed. It

1 further erred by failing to recognize the creation of genuine issues of
2 material fact by Spadaro's opinion.

3
4 CONCLUSION

5 The District Court erroneously concluded, as a matter of law, that
6 ACC owed no duties to 4N Trucking's employee, Denice Stokke. Because
7 of this error, it never reached the question of whether ACC was in fact
8 negligent, or whether genuine issues of material fact existed. This Court
9 should reverse the District Court's Order and remand for further
10 proceedings.
11

12 DATED this 3rd day of May, 2017.

13
14 REEP, BELL, LAIRD & JASPER, P.C.

15
16 By: 

17 Robert T. Bell
18 Attorneys for Appellant
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DATED this 3rd day of May, 2017.

By: Robert T. Bell
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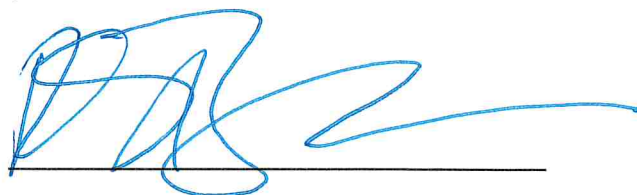
CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 3rd day of May, 2017, I have filed a true and accurate copy of the foregoing Opening Brief of Appellant Denice A. Stokke with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of the foregoing upon the following as indicated:

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APPENDIX 2: Contract for Loading and Transportation of Products, and for Road Maintenance (American Colloid Company / 4N Trucking Contract)

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